

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

REVEAL CHAT HOLDCO, LLC., et al.,
 Plaintiffs,
 v.
 FACEBOOK, INC.,
 Defendant.

Case No. 20-cv-00363-BLF

**ORDER GRANTING DEFENDANT
 FACEBOOK, INC.'S MOTION TO
 DISMISS**

[Re: ECF 25]

This is a putative class action antitrust lawsuit brought by Plaintiffs Reveal Chat Holdco LLC (“Reveal Chat”), USA Technology and Management Services, Inc. (“Lenddo”), Cir.cl, Inc. (“Cir.cl”), and Beehive Biometric, Inc. (“Beehive Biometric”) (collectively, “Plaintiffs”) against Defendant Facebook, Inc. (“Facebook”). Before the Court is Facebook’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiffs’ claims are time-barred, Plaintiffs have not suffered an antitrust injury, Plaintiffs have failed to allege plausible product markets, and Plaintiffs have otherwise failed to state a claim upon which relief can be granted. Mot. to Dismiss (“Mot.”) 1, ECF 25. Plaintiffs oppose. *See* Opp. to Mot. (“Opp.”), ECF 43. The Court heard oral argument on this motion on June 11, 2020. For the reasons stated below and on the record, the Court GRANTS Facebook’s motion and DISMISSES WITH LEAVE TO AMEND IN PART and DISMISSES WITHOUT LEAVE TO AMEND IN PART the Complaint.

I. BACKGROUND¹

Facebook is a publicly-traded social media company that was founded in 2004 by Mark Zuckerberg. Class Action Compl. (“Compl.”) ¶¶ 26-26, 35, ECF 1. Facebook provides online

¹ Plaintiffs’ well-pled factual allegations are accepted as true for purposes of the motion to dismiss. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

1 services to two billion users worldwide and in exchange it collects user data, which its uses to
2 create and sell advertising services. Compl. ¶ 27. Additionally, Facebook operates as a platform
3 for third-party applications and hardware. Compl. ¶ 28. Between 2004 and 2010, Facebook
4 emerged as “the dominant social network in the United States.” Compl. ¶ 36.

5 The data that Facebook collects from users includes: information shared on personal pages,
6 photos and profiles viewed, connections to others, things shared with others, and the content of
7 messages to other users. Compl. ¶ 46. This data can be used for targeted advertising, and the
8 social data created by Facebook’s network can be monetized in a number of ways from targeted
9 advertising and machine learning to commercializing access so that data can be mined by third
10 parties. Compl. ¶¶ 47-49. “By 2010, Facebook stood alone as the dominant player in the newly
11 emergent market for social data (the ‘Social Data Market’) – a market in which Facebook’s own
12 users provided Facebook with a constant stream of uniquely valuable information, which
13 Facebook in turn monetized through the sale of social data (for example, through advertising,
14 monetizing [Application Programming Interfaces (“APIs”)], or other forms of commercializing
15 access to Facebook’s network).” Compl. ¶ 50.

16 Because user data made Facebook’s network more valuable and thus attracted more
17 customers which then led to more data and more customers, a feedback loop emerged. Compl.
18 ¶¶ 52-54. The feedback loop, in turn, created a barrier to entry because competing with Facebook
19 required “a new entrant . . . to rapidly replicate both the breadth and value of the Facebook
20 network.” Compl. ¶ 55. This barrier to entry also allowed Facebook to control and increase prices
21 in the Social Data and Social Advertising Markets without the pressures of price competition from
22 existing competitors or new entrants. Compl. ¶ 56; *see* Compl. ¶¶ 57-60.

23 In 2012, Facebook coined the term “Open Graph” “to describe a set of tools developers
24 could use to traverse Facebook’s network of users, including the social data that resulted from user
25 engagement.” Compl. ¶¶ 90-92. Open Graph contained a set of APIs, which “allowed those
26 creating their own social applications to query the Facebook network for information.” Compl.
27 ¶ 92. Beginning in the fall of 2011, to address the threat posed by mobile applications, Facebook
28 devised a scheme to attract third-party developers to build for their platform and then remove

1 access to the APIs that were central to these applications. Compl. ¶ 117. For example, the
2 “Friends API” allowed third-party developers to search through a user’s friends, as well as their
3 friends of friends, and the “Newsfeed API” allowed third-party developers to search a user’s
4 newsfeed. Compl. ¶¶ 117-19. Without access to this data, third-party applications “would be
5 abruptly left with none of the social data they needed to function.” Compl. ¶ 119. By August
6 2012, Facebook planned to prevent competitive third-party applications from buying social data
7 from Facebook. Compl. ¶¶ 120-21. Facebook even identified direct, horizontal competitors in the
8 Social Data and Social Advertising Markets. Compl. ¶ 128. In November 2012, Facebook
9 announced that it would block competitors or require full data reciprocity for continued access to
10 its data. Compl. ¶ 136.

11 In April 2014, Facebook announced that it would remove access to several rarely used
12 APIs, including the Friend and Newsfeed APIs. Compl. ¶ 202. After this announcement and
13 through the full removal of the APIs in April 2015, Facebook entered into Whitelist and Data
14 Sharing Agreements with certain third-party developers that allowed continued access to the
15 Friends or NewsFeed APIs and included a provision acknowledging that the covered APIs were
16 not available to the general public. Compl. ¶¶ 207-08. These agreements “were only offered in
17 exchange for massive purchases of Facebook’s social data through mobile advertising and/or
18 through the provision of the developer’s own social data back to Facebook (so-called
19 ‘reciprocity’).” Compl. ¶ 209.

20 In 2012, Facebook acquired its competitor, Instagram for \$1 billion. Compl. ¶ 260. The
21 acquisition of “Instagram was instrumental to Facebook’s explosive growth in the Social Data and
22 Social Advertising Markets.” Compl. ¶ 270. In 2014, Facebook acquired another competitor,
23 WhatsApp, for \$22 billion. Compl. ¶ 290. The acquisition of WhatsApp “further solidified
24 Facebook’s dominance in the Social Data and Social Advertising Markets.” Compl. ¶ 292.
25 Facebook is currently integrating the backends of its products with WhatsApp and Instagram.
26 Compl. ¶ 294.

27 Based on the above actions, Plaintiffs filed their Class Action Complaint on January 16,
28 2020. The complaint alleges six causes of action for: (1) monopolization in violation of Section 2

of the Sherman Antitrust Act (the “Sherman Act”), 15 U.S.C. § 2, for acquiring and maintaining a monopoly in the relevant markets for Social Data and Social Advertising; (2) violation of Section 2 of the Sherman Act for attempting to monopolize the Social Data and Social Advertising Markets; (3) violation of Section 1 of the Sherman Act under a hub-and-spoke theory because Facebook’s Whitelist and Data Sharing Agreements controlled the supply of social data; (4) violation of Section 7 of the Clayton Antitrust Act (the “Clayton Act”), 15 U.S.C. § 18, for Facebook’s acquisition and integration of Instagram and WhatsApp; (5) violation of Section 2 of the Sherman Act because Facebook acquired and maintained a monopoly in the Social Data and Social Advertising Markets through its acquisition and integration of Instagram and WhatsApp; and (6) a request for injunctive relief and divestiture. Compl. ¶¶ 403-51.

II. LEGAL STANDARD

“A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not “accept as true allegations that contradict matters properly subject to judicial notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* On a motion to dismiss, the Court’s review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).

In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital*, 316 F.3d at 1052. “[I]t is the consideration of prejudice to the opposing party that carries the greatest weight.” *Id.* However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.*

III. DISCUSSION

Facebook argues that Plaintiffs’ claims are time-barred, Plaintiffs failed to plausibly allege an antitrust injury, and Plaintiffs failed to state a claim for relief. Mot. 6-25. The Court addresses each argument in turn.

A. Statute of Limitations and Doctrine of Laches

Facebook argues that Plaintiffs’ claims for damages are barred by the four-year statute of limitations and Plaintiffs’ requests for injunctive relief are precluded by the doctrine of laches. Mot. 6-10. Specifically, as to Plaintiffs’ damages claims, Facebook argues that the statute of limitations for antitrust claims runs from the commission of an act that injures the plaintiff. Mot. 6. Facebook argues that Plaintiffs challenge four independent acts: the acquisition of Instagram in April 2012; the acquisition of WhatsApp in February 2014; the Whitelist and Data Sharing Agreements between April 2014 and April 2015; and Facebook’s April 2015 modification of its API policy. Mot. 6. Accordingly, because these acts occurred five to eight years before the Complaint was filed, Facebook argues that the statute of limitations has run. Mot. 6. For similar reasons, Facebook argues that Plaintiffs’ request for injunctive relief is barred by the doctrine of laches because Plaintiffs’ years-long delay in bringing the action was inexcusable as each challenged act was highly publicized and because Facebook was prejudiced by the unreasonable delay. Mot. 7-8. Moreover, Facebook argues that fraudulent concealment does not toll the limitations or laches periods because Plaintiffs have not alleged that Facebook affirmatively

misled Plaintiffs and because Plaintiffs had actual or constructive knowledge of facts giving rise to their claims. Mot. 8. Facebook argues that because the acquisitions were publicly announced and because Plaintiffs were allegedly dependent on the Friends and Newsfeed APIs, Plaintiffs would have had constructive knowledge. Mot. 9. While Plaintiffs argue that they did not learn this information until internal documents were released, Facebook argues that such documents have no bearing on Plaintiffs' claim as intent is not the focus of antitrust law. Mot. 10. Facebook also notes that fraudulent concealment must be pled in accordance with Rule 9(b), which Plaintiffs fail to do, and Plaintiffs do not allege that Facebook concealed anything relevant to their claims. Mot. 9.

Plaintiffs, on the other hand, argue that their Sherman Act claims are timely under the doctrine of fraudulent concealment; their Clayton Act claim and their claim for injunctive relief and divestiture are timely because they go toward ongoing conduct and harm; and their monopolization claim under Section 2 of the Sherman Act is timely as to Facebook's post-January 2016 conduct. Opp. 19-25. First, Plaintiffs argue that Facebook fraudulently concealed facts giving rise to Plaintiffs' Sherman Act claims from December 2012 through November 2019 and that none of the publicly available facts gave rise to Plaintiffs' claims. Opp. 19-21. Plaintiffs, therefore, argue that they lacked actual and constructive knowledge of Facebook's anticompetitive scheme. Opp. 23-24. Second, Plaintiffs argue that their Clayton Act and injunctive relief claims go to the back-end integration of Instagram and WhatsApp, which was unknown to Plaintiffs until March 2019. Opp. 24. Additionally, Plaintiffs argue that their Clayton Act claim is timely under the hold-and-use doctrine, which restarts the statute of limitations for Clayton Act violations where a plaintiff asserts that the acquisitions are used in a different manner than they were used when they were acquired and the new uses injure the plaintiff. Opp. 25. Finally, Plaintiffs argue that their monopolization claim under Section 2 of the Sherman Act is timely with respect to conduct and damages occurring since January 16, 2016. Opp. 25.

Plaintiffs argue that the doctrine of laches does not apply to their claims for prospective injunctive relief and their claims are timely under the doctrines of fraudulent concealment, continuing violation, and hold-and-use, even though they acknowledge that the initial events

1 giving rise to these claims occurred more than four years ago. Accordingly, the Court addresses,
2 in turn, Plaintiffs' arguments as to the doctrine of laches before turning to each tolling theory.

3 **1. Doctrine of laches**

4 "[T]he deadline for suits for equitable relief under the antitrust laws is governed by laches,
5 and . . . the four-year statute of limitations in 15 U.S.C. § 15b furnishes a guideline for
6 computation of the laches period." *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205
7 (9th Cir. 2014). Relying on *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001), Plaintiffs
8 argue that the doctrine of laches does not apply to bar prospective injunctive relief, and therefore
9 their claim under Section 7 of the Clayton Act (Count IV) and their claim for injunctive relief
10 (Count VI) are timely as they seek prospective relief for anticompetitive conduct. Opp. 24.
11 Specifically, Plaintiffs argue that Facebook errs in arguing that the doctrine of laches "can
12 somehow apply here, given the recency of both the conduct and initial revelations regarding
13 Facebook's back-end integration." Opp. 24.

14 First, the Court notes that *Danjaq* is a copyright infringement case, and Plaintiffs do not
15 articulate why *Danjaq* should apply in the antitrust context. Second, while recognizing that
16 "laches typically does not bar prospective injunctive relief," the Ninth Circuit noted in *Danjaq* that
17 "the rule is not . . . an absolute one." *Id.* at 959. Indeed, the *Danjaq* court held that the doctrine of
18 laches barred prospective injunctive relief where the feared infringements were identical to the
19 alleged past infringements. *Id.* at 960. Finally, the Ninth Circuit further noted "the general rule
20 that laches does not bar future injunctive relief stems from . . . prejudice to the defendant
21 occasioned by the plaintiff's past delay, but almost by definition, the plaintiff's past dilatoriness is
22 unrelated to a defendant's ongoing behavior that threatens future harm." *Id.* at 959-60. Here,
23 Plaintiffs' past delay is related to Facebook's ongoing behavior. Plaintiffs challenge Facebook's
24 2012 and 2014 acquisitions of Instagram and WhatsApp and seek prospective relief as to
25 Facebook's recent decision to integrate Instagram and WhatsApp. Facebook's allegedly recent
26 decision to integrate Instagram and WhatsApp, however, is related to Plaintiffs' past delay in that
27 Facebook's integration of these companies is part and parcel of acquiring a company.
28 Accordingly, the Court finds that the doctrine of laches applies to the instant case.

2. Fraudulent concealment

“A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence.” *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012). “The plaintiff carries the burden of pleading and proving fraudulent concealment.” *Id.* (brackets and internal quotation marks omitted). “To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have ‘actual or constructive knowledge of the facts giving rise to its claim’; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim.” *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015) (quoting *Hexcel Corp.*, 681 F.3d at 1060)). Thus, “[a] fraudulent concealment defense requires a showing both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action.” *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud.” *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988). “It is enough that the plaintiff should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim.” *Hexcel Corp.*, 681 F.3d at 1060 (internal quotation marks omitted).

“Moreover, allegations of fraudulent concealment must be pled with particularity.” *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868, 885 (N.D. Cal. 2015). “Conclusory statements are not enough.” *Conmar Corp. v. Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 502 (9th Cir. 1988). “However, it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly when the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators.” *In re Animation Workers*, 123 F. Supp. 3d at 1194.

Here, Plaintiffs allege that Facebook fraudulently concealed “specific facts of its anticompetitive conduct from Plaintiffs until November 6, 2019,” “[t]hrough NDAs; through

1 overbroad and/or improper assertions of privilege and confidentiality; through lies to regulators, to
 2 the press, to developers, and to the public; and through other means and mechanisms of
 3 intentionally suppressing and concealing from public view the true nature, motivation,
 4 mechanisms, and intent of Facebook’s actions.” Compl. ¶ 386.

5 First, the Court finds that Plaintiffs have failed to sufficiently plead fraudulent concealment
 6 because they have not pled that Facebook took affirmative acts to mislead them. To allege
 7 fraudulent concealment, Plaintiffs must establish that “its failure to have notice of its claim was
 8 the result of [Facebook’s] affirmative conduct.” *Conmar*, 858 F.2d at 505. “Passive concealment
 9 of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary
 10 duty to disclose information to the plaintiff.” *Id.* (citation omitted). “An affirmative act of denial,
 11 however, is enough if the circumstances make the plaintiff’s reliance on the denial reasonable.”
 12 *Id.* “Thus, the mere failure to own up to illegal conduct in response to an inquiry about whether
 13 the defendant engaged in illegal antitrust activity is not sufficient for fraudulent concealment, and
 14 to find otherwise would effectively nullify the statute of limitations in these cases.” *Ryan v.*
 15 *Microsoft Corp.*, 147 F. Supp. 3d 868, 886 (N.D. Cal. 2015) (internal quotation marks omitted).

16 Here, Plaintiffs have not alleged that Facebook took any affirmative acts to mislead them.
 17 Indeed, Plaintiffs rely on “Facebook’s *private* actions, communications and agreements between
 18 2012 and 2015,” arguing that Facebook’s public-facing actions did not reveal any facts giving rise
 19 to their claims. Opp. 20-21. But this is not enough for Plaintiffs to meet their burden of showing
 20 that Facebook took affirmative acts to mislead them. For example, Plaintiffs list the “specifics of
 21 Facebook’s fraudulent concealment” in their opposition brief, which include Mark Zuckerberg’s
 22 veto of a decision to make the Friends and Newsfeed APIs available and to instead selectively
 23 enforce that decision against Facebook’s competitors; Zuckerberg’s rejection of an approach that
 24 would include an announcement to developers about this decision; Facebook’s decision not follow
 25 a suggestion by its employees to announce that the APIs were unavailable and to negotiate access;
 26 an email from a senior Facebook engineer explaining protectionist competitive concerns;
 27 Facebook’s decision to enter into private whitelist and data sharing agreements; Facebook’s
 28 continued evangelization of APIs to developers; and Facebook’s decision to keep “tightly

underwraps” the “real reason for the removal of the APIs.” Opp. 21-23. These allegations, however, do not include affirmative conduct on the part of Facebook to mislead Plaintiffs or the market, and Plaintiffs do not explain how any of these actions were affirmative acts that misled them. Indeed, there are no allegations that Facebook stated that Plaintiffs would have access to the APIs forever and there are no allegations concerning Facebook’s conduct after 2015. Furthermore, Plaintiffs have not alleged a fiduciary relationship with Facebook or its senior employees, such that Facebook would have a duty to disclose any information to Plaintiffs.

At the hearing, Plaintiffs relied on *In re Glumetza Antitrust Lit.*, 2020 WL 1066934 (N.D. Cal. Mar 5, 2020), for the proposition that “affirmative silence,” “intentional silence,” or “half-truths” can constitute an affirmative act of concealment. But that case is inapposite. In *In re Glumetza*, the Court noted that the defendants were under a duty to disclose before recognizing that “[h]alf-truths – representations that state the truth only so far as it goes, while omitting critical qualifying information – can be actionable misrepresentations.” *Id.* at *7. The court explained that “[o]ne who chooses to speak has a duty to include as much information as necessary to prevent misleading others.” *Id.* Here, as stated above, Plaintiffs have not alleged that Facebook had a duty to disclose. Additionally, Plaintiffs have failed to allege the critical qualifying information that Facebook omitted when speaking to Plaintiffs, or the market, that was necessary to prevent Facebook from misleading anyone.

Second, the Court finds that Plaintiffs have not sufficiently pled fraudulent concealment as they have not plausibly alleged that they were without actual or constructive knowledge of the facts giving rise to their claim. For example, Facebook’s acquisitions of Instagram and WhatsApp were widely publicized in 2012 and 2014 respectively; Facebook announced in a blogpost on April 30, 2014, that access to the Friends and Newsfeed APIs would be removed; and the Wall Street Journal reported on the Whitelist and Data Sharing Agreements in September 2015. Reply 2-3; Mot. 6; *see* Compl. ¶¶ 202, 205, 260, 290. Thus, at the very least, Plaintiffs had constructive knowledge of the facts that give rise to their claims.

Finally, the Court finds that Plaintiffs have not sufficiently pled fraudulent concealment because Plaintiffs fail to allege how they acted diligently in trying to uncover the facts giving rise

1 to their claims. “Diligent inquiry is required where facts exist that would excite the inquiry of a
2 reasonable person,” and diligence must be pled with particularity. *In re Glumetza*, 2020 WL
3 1066934, at *6 (internal quotation marks omitted). Here, the publicly available facts regarding
4 Facebook’s allegedly anticompetitive conduct would excite the inquiry of a reasonable person, and
5 therefore Plaintiffs must plead diligence with particularity. They have failed to do so here.
6 Indeed, Plaintiffs do not appear to include any allegations on this element and it appears that they
7 simply waited until Facebook’s internal documents were release in November 2019 to uncover
8 their claims. This, however, is not indicative of diligence.

9 Accordingly, for the reasons stated above, the Court finds that Plaintiffs have not
10 sufficiently pled fraudulent concealment as to their Sherman Act claims (Counts I, II, III, and V).

11 **3. Continuing violation**

12 “To state a continuing violation of the antitrust laws in the Ninth Circuit, a plaintiff must
13 allege that a defendant completed an overt act during the limitations period that meets two criteria:
14 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2)
15 it must inflict new and accumulating injury on the plaintiff.” *Samsung Elecs. Co. v. Panasonic*
16 *Corp.*, 747 F.3d 1199, 1202 (9th Cir. 2014); *accord Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086
17 (9th Cir. 2014) (stating limitations begins to run from date of each “new overt act causing injury”).

18 Plaintiffs argue that their Section 7 claim under the Clayton Act related to Facebook’s
19 acquisition and integration of Instagram and WhatsApp (Count IV) and their claim for injunctive
20 relief (Count VI) are timely as the conduct and harm are ongoing “until March 2019 at the
21 earliest” based on “the recency of both the conduct and initial revelations regarding Facebook’s
22 back-end integration.” Opp. 24. Additionally, Plaintiffs argue that their Section 2 claims under
23 the Sherman Act regarding the acquisition and integration of Instagram and WhatsApp (Count V)
24 is timely as to all conduct and damages occurring since January 16, 2016. Opp. 25. Specifically,
25 Plaintiffs argue that Facebook’s March 2019 announcement about the ongoing back-end
26 integration of Instagram and WhatsApp constitutes a new act that is not a reaffirmation of a
27 previous act and inflicts a new and accumulating injury on at least Plaintiff Lenddo. Opp. 25.

28 The Court disagrees. The continuing violation doctrine does not make sense in the context

of anticompetitive mergers, and therefore it should not apply to Section 7 claims under the Clayton Act. *See* *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004); *Complete Entm't Res. LLC v. Live Nation Entm't, Inc.*, No. CV159814DSFAGRX, 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016). “Section 7 of the Clayton Act is the mechanism for challenging a potentially anticompetitive merger,” and it has a statute of limitations within which mergers must be challenged. *Complete Entm't Res.*, 2016 WL 3457177, at *1. If the continuing violation doctrine applied, “every business decision could qualify as a continuing violation to restart the statute of limitations as long as the firm continued to desire to be merged.” *Midwestern Mach.*, 392 F.3d at 271. This would write the statute of limitations out of the law by allowing a merger to be challenged indefinitely. *See* *Complete Entm't Res.*, 2016 WL 3457177, at *1. This cannot be the case because “[u]nlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme, and “[o]nce the merger is completed, the plan to merge is completed, and no overt acts can be undertaken to further that plan.” *Midwestern Mach.*, 392 F.3d at 271. Thus, the Court agrees with the Eighth Circuit and the Central District of California that the continuing violation doctrine does not apply in the context of Section 7 claims under the Clayton Act.

Moreover, while the Sherman Act regulates a broader swath of conduct than the Clayton Act, Plaintiffs’ claim under Count V is for an acquisition-merger monopoly, which is the precise conduct governed by the Clayton Act. *See* Compl. ¶ 433 (“Through Facebook’s acquisition and integration of Instagram and WhatsApp, Defendant has willfully acquired and maintained monopoly power for Facebook in the relevant markets for Social Data and Social Advertising.”). “There is no reason to treat the same conduct differently in sister statutes that are designed to promote the same legislative objective.” *Complete Entm't Res.*, 2016 WL 3457177, at *1 (quoting *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 603 (6th Cir. 2014)). Indeed, 15 U.S.C. § 15b provides the statute of limitations for claims under Section 2 of the Sherman Act and claims under Section 7 of the Clayton Act, and “[t]here is nothing in 15 U.S.C. § 15b that suggests it should be applied one way for merger-acquisition claims under the Sherman Act but differently for merger-acquisition claims under the Clayton Act.” *Id.* (quoting *Z Techs.*, 753 F.3d at 603). Accordingly,

the Court finds that it is not appropriate to apply the continuing violation doctrine in this context.

Even assuming the continuing violation doctrine applies in this context, however, the Court notes that Plaintiffs have not plausibly alleged in a non-conclusory manner how the back-end integration of Instagram and WhatsApp constitutes new and independent acts, or how the back-end integration inflicted a new and accumulating injury on Plaintiffs.

The Court, therefore, finds that the continuing violation doctrine does not apply to Plaintiffs' Section 7 claim with respect to Facebook's acquisition and integration of Instagram and WhatsApp (Count IV); Plaintiffs' Section 2 claim with respect to Facebook's acquisition and integration of Instagram and WhatsApp (Count V); or Plaintiffs' claim for injunctive relief (Count VI).

4. Hold-and-use doctrine

Under the hold-and-use doctrine, "if assets are used in a different manner from the way that they were used when the initial acquisition occurred, and that new use injures the plaintiff, he or she has four years from the time that the injury occurs to sue." *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1188 (N.D. Cal. 2012) (quoting *Midwestern Mach.*, 392 F.3d at 273)); accord *Complete Entm't Res.*, 2016 WL 3457177, at *2. Plaintiffs argue that their Section 7 claim under the Clayton Act is timely under the hold-and-use doctrine because, while Instagram and WhatsApp were acquired in 2012 and 2014 respectively, the companies operated independently until March 2019 when Facebook decided to integrate the companies. Opp. 25. The hold-and-use doctrine, however, "is not particularly well-developed and if interpreted too broadly could easily eviscerate the statute of limitations for section 7 of the Clayton Act." *Complete Entm't Res.*, 2016 WL 3457177, at *2. Indeed, the Court in *Complete Entm't Res.* was "skeptical of the legitimacy of the hold and use doctrine in part for this reason," and noted that it found "no Ninth Circuit opinion adopting it and . . . only two district court cases from within the Circuit that apply it, both relatively recently." *Id.* Plaintiffs do not provide any cases suggesting that the legitimacy of this doctrine, or its use in the Ninth Circuit, has changed. See Opp. (citing two out-of-circuit opinions and a 2012 case from the Northern District of California, which was cited by *Complete Entm't Res.*). This Court is also skeptical that the doctrine should apply in the

context of Section 7 claims under the Clayton Act as “[i]t makes much more sense to challenge the later anticompetitive act itself, rather than to couch the challenge as one against the merger or asset acquisition.” *Complete Entm’t Res.*, 2016 WL 3457177, at *2.

In any event, even assuming that the hold-and-use doctrine is valid in this context, the Court finds that Plaintiffs have not plausibly alleged how the back-end integration of Instagram and WhatsApp are different uses of the assets, and Plaintiffs have not plausibly alleged that Facebook’s back-end integration of Instagram and WhatsApp caused new injuries. For example, while Plaintiffs argue that Facebook operated Instagram and WhatsApp independently after they were acquired, the Complaint contains allegations that Facebook began integrating WhatsApp as early as 2018. Compl. ¶¶ 296-97. Furthermore, Plaintiffs argue that the back-end integration of Instagram and WhatsApp caused injuries to Plaintiffs, specifically Lenddo; however, Plaintiffs have not described these new injuries or explained how these injuries are new.

Accordingly, the Court finds that the hold-and-use doctrine does not apply to Plaintiffs’ Section 7 claim under the Clayton Act with respect to Facebook’s acquisition and integration of Instagram and WhatsApp (Count IV).

5. Conclusion

For the reasons stated above, the Court finds that Plaintiffs claims are time-barred by the statute of limitations and doctrine of laches, and no tolling theory applies to the facts as alleged. Accordingly, the Court GRANTS Facebook’s motion to dismiss the Complaint and DISMISSES the Complaint. Because Plaintiffs may cure the defects related to fraudulent concealment with amendment, the Court DISMISSES WITH LEAVE TO AMEND the Complaint as to Plaintiffs’ fraudulent concealment theory. Because amendment would be futile as to Plaintiffs’ continuing violation and hold-and-use doctrine arguments, the Court DISMISSES WITHOUT LEAVE TO AMEND the Complaint as to Plaintiffs’ continuing violation and hold-and-use doctrine arguments.

B. Antitrust Injury

Facebook argues that Plaintiffs do not have antitrust standing because they have not plausibly alleged an antitrust injury. Mot. 11-17. First, Facebook argues that Plaintiffs fail to

1 allege a causal antitrust injury because they fail to allege facts to support that they were excluded
 2 from either alleged market and that they were excluded by Facebook's alleged conduct. Mot. 11-
 3 12. Additionally, Facebook argues that Plaintiffs fail to explain why, absent Facebook's alleged
 4 conduct, they would not have suffered the same injuries, and they fail to plausibly allege that they
 5 were unable to compete by means other than by relying on Facebook data. Mot. 12-13. Second,
 6 Facebook argues that Plaintiffs have not alleged antitrust injury in the Social Advertising Market.
 7 Third, Facebook argues that Plaintiffs lack antitrust standing to bring their monopolization and
 8 attempted monopolization claims because they do not allege that they suffered injury as a putative
 9 competitor of Facebook in the relevant market when Facebook stopped making the data available,
 10 and Plaintiffs provide no information about their plans to successfully enter either market.
 11 Mot. 13-14. While Plaintiffs allege significant barriers to entry in both markets, Facebook argues
 12 that Plaintiffs have not alleged that Facebook did anything to create this barrier to entry or that
 13 Plaintiffs have the resources to enter either purported market. Mot. 14-15. Fourth, Facebook
 14 argues that Plaintiffs lack antitrust standing to bring their Section 1 claim under the Sherman Act
 15 because the alleged injury goes solely to unilateral conduct and Plaintiffs have not explained how
 16 the agreements could plausibly cause their injuries. Mot. 15-16. Finally, Facebook argues that
 17 Plaintiffs were not injured by the acquisition and integration of Instagram and WhatsApp because
 18 they have not demonstrated that they would not have suffered the identical loss absent the
 19 challenged acquisition and integration. Mot. 16. Facebook argues that Plaintiffs' theory of injury
 20 is speculative because there is no allegation that, if another firm acquired Instagram and
 21 WhatsApp, they would have made their data available. Mot. 16-17.

22 Plaintiffs disagree. First, Plaintiffs argue they have alleged sufficient facts to support
 23 antitrust injury for their Sherman Act Section 2 claim. Opp. 16-17. Specifically, Plaintiffs argue
 24 that they were injured because Facebook eliminated them from the Social Data and Social
 25 Advertising Markets, extracted social data from remaining whitelisted applications on its platform,
 26 and extracted data to build up the social data barrier to entry to protect Facebook's business. Opp.
 27 16. Plaintiffs argue that this prevented further competition in the relevant markets and allowed
 28 Facebook to raise prices for social data and social advertising. Opp. 16. Moreover, Plaintiffs

1 argue that they are participants in the Social Advertising Market. Opp. 17. Second, Plaintiffs
2 argue that they allege an antitrust injury for their Clayton Act Section 7 claim for the same
3 reasons. Opp. 18-19.

4 The Ninth Circuit has held that an antitrust injury consists of five elements: “(1) unlawful
5 conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct
6 unlawful, . . . (4) that is of the type the antitrust laws were intended to prevent,” and (5) “the
7 injured party [is] a participant in the same market as the alleged malefactors.” *Somers v. Apple,*
8 *Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (internal quotation marks omitted). That is, as to the fifth
9 element, “the party alleging the injury must be either a consumer of the alleged violator’s goods or
10 services or a competitor of the alleged violator in the restrained market.” *Id.* (internal quotation
11 marks omitted).

12 Here, Plaintiffs argue that there are at least five different types of antitrust injury including
13 increased prices, lessening of consumer choice, direct exclusion of Plaintiffs from the relevant
14 markets, strengthening a barrier to entry and preventing reentry; and eliminating rival platforms.
15 *See* Compl. ¶¶ 364-95; Hearing Tr., at 36, ECF 56. The Court, however, agrees with Facebook
16 that Plaintiffs have failed to plausibly allege an antitrust injury such that Plaintiffs have antitrust
17 standing.

18 First, the Court finds that Plaintiffs have not plausibly alleged an injury caused by unlawful
19 conduct. While Plaintiffs’ spend several pages of the Complaint describing their alleged antitrust
20 injury, the allegations are nothing more than “naked assertions devoid of further factual
21 enhancement,” which are insufficient to survive a motion to dismiss. *Blantz v. Cal. Dep’t of Corr.*
22 *& Rehab.*, 727 F.3d 917, 927 (9th Cir. 2013). Moreover, Plaintiffs have failed to plausibly allege
23 in a non-conclusory manner that they themselves have been injured. *See NorthBay Healthcare*
24 *Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 305 F. Supp. 3d 1065, 1076 (N.D. Cal. 2018)
25 (recognizing that plaintiffs must allege that they themselves suffered antitrust injury). For
26 example, Plaintiffs allege that they have been harmed because they were excluded from the
27 relevant markets, “had their business and assets destroyed by Facebook’s anticompetitive
28 scheme,” and are prevented from entry or reentry into the relevant markets because of Facebook’s

1 exclusionary conduct. Compl. ¶ 385. These allegations, however, are nothing more than
2 conclusory allegations and the Court need not accept conclusory allegations as true. *See In re*
3 *Gilead Scis. Sec. Litig.*, 536 F.3d at 1055.

4 Second, it is not clear whether Plaintiffs have plausibly alleged that the fifth element of
5 antitrust injury is satisfied as it is unclear whether Plaintiffs are consumers or competitors of
6 Facebook, and whether Plaintiffs participate in the Social Advertising Market. As stated at the
7 hearing, the Court notes that Plaintiffs' 110-page Complaint includes very few allegations as to
8 Plaintiffs' individual businesses. Indeed, while Plaintiffs Cir.cl and Beehive Biometric have been
9 dissolved, *see* Compl. ¶¶ 22-25, the status of Plaintiff Reveal Chat is unclear and Plaintiffs tout
10 Plaintiff Lenddo as a "market leader," Compl. ¶¶ 18-21. Additionally, because Plaintiffs appear to
11 straddle the line between consumer and competitor, it is difficult to determine whether Plaintiffs
12 have in fact plausibly alleged an antitrust injury. For example, Plaintiffs appear to argue that they
13 are competitors of Facebook and they allege that "Facebook's anticompetitive scheme has allowed
14 it to raise prices . . . for social advertising." Compl. ¶ 381. An increase in market prices, "though
15 harmful to competition, actually benefit[s] competitors." *Matsushita Elec. Indus. Co. v. Zenith*
16 *Radio Corp.*, 475 U.S. 574, 583 (1986). Thus, because "[t]here can be no antitrust injury if the
17 plaintiff stands to gain from the alleged unlawful conduct," Plaintiffs have failed to allege an
18 antitrust injury in this respect if they are competitors of Facebook. *Am. Ad Mgmt., Inc. v. Gen.*
19 *Tel. Co. of Cal.*, 190 F.3d 1051, 1056 (9th Cir. 1999).

20 Accordingly, the Court GRANTS Facebook's motion to dismiss for failure to allege
21 antitrust injury. Because this defect may be cured by amendment, the Court DISMISSES WITH
22 LEAVE TO AMEND the Complaint.

23 C. Failure to State a Claim

24 The Court need not address Facebook's additional arguments as to why Plaintiffs have
25 failed to state a claim because Plaintiffs' claims are time-barred and because Plaintiffs have not
26 plausibly alleged an antitrust injury. *See* Mot. 16-25. The Court, however, briefly addresses these
27 issues to provide Plaintiffs with guidance for their amended complaint.
28

1. Relevant product market

To state an antitrust claim under the Sherman Act, “plaintiffs must plead a relevant market.” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018). “While plaintiffs need not plead a relevant market with specificity, ‘there are some legal principles that govern the definition of an antitrust “relevant market,” and a complaint may be dismissed under Rule 12(b)(6) if the complaint’s “relevant market” definition is facially unsustainable.’” *Id.* (brackets and alterations omitted) (quoting *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)). The relevant market must include a product market, and the product market “must encompass the product at issue as well as all economic substitutes for the product.” *Id.* (internal quotation marks omitted). “Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product. *Id.* (internal quotation marks omitted).

Plaintiffs allege that there are two relevant product markets: (1) the Social Data Market, and (2) the Social Advertising Market. Facebook argues that each of Plaintiffs’ alleged product markets is implausible. *See* Mot. 17-21. The Court addresses each market, in turn.

a. Social Data Market

Facebook argues that Plaintiffs’ alleged Social Data Market is implausible because it fails to allege the contours of the market, who participates in the market, and why social data is not interchangeable with other forms of data. Mot. 18-20. Specifically, Facebook argues that it is “unclear just how far beyond direct engagement with the social network the ‘social data’ penumbra extends” because the Complaint indicates that social data can extend from contacts in smartphones and messages to friends, but not credit card statements – although Plaintiffs allege that these statements provide data. Mot. 18. Additionally, Facebook argues that Plaintiffs are not clear about who participates in the Social Data Market because their description is “vague and meandering” and the Complaint contradicts itself as to whether monetization is required for market participation. Mot. 19. Moreover, Facebook argues that the market is legally insufficient as pled because it does not encompass all economic substitutes for the product as it is not clear why other forms of data are not reasonably interchangeable for antitrust purposes with social data.

Mot. 19. Facebook further argues that the Complaint does not plausibly allege that social data is economically distinct from any other form of data. Mot. 20. Finally, Facebook argues that Plaintiffs suggest they are horizontal competitors with Facebook and could replace them, but Facebook argues that Plaintiffs fail to allege facts to support this conclusion.

Plaintiffs, on the other hand, argue that they plausibly allege the existence and boundaries of the Social Data Market. Opp. 11-14. According to Plaintiffs, social data “is a particular form of data that arises from the interaction among users on social networks that provide users with ‘among other things, the ability to send each other messages, signals, such as likes or pokes, photos and video, view information about others in their network, and the ability to explore other connections among their friends.’” Opp. 11 (internal quotation marks omitted). Plaintiffs argue that not all data is social data as social data allows “fine-tuned targeting of individuals by granular attributes” and “arises only from user engagement across a network of other users.” Opp. 11 (internal quotation marks omitted). Plaintiffs additionally argue that Facebook identified Plaintiffs as its horizontal competitors who compete with Facebook for social data. Opp. 13. Finally, Plaintiffs argue that while other products may have been considered competitive, that was not Facebook’s view contemporaneous to its scheme. Opp. 13.

As stated at the hearing, the Court notes that Plaintiffs need to clearly define the boundaries of the market and what is included in the Social Data Market. However, while the Court recognizes that Facebook’s arguments may have merit, at this stage of the proceedings, the Court finds that the issues Facebook raises should be resolved on a more developed factual record. *See e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) (finding allegations sufficient for pleading purposes because, while it was unclear whether parties participated in the same market, the issues should be resolved on a more developed factual record).

b. Social Advertising Market

Next, Facebook argues that Plaintiffs’ Social Advertising Market is implausible because many courts have rejected antitrust claims on proposed advertising markets limited to a single form of advertising. Mot. 20. Additionally, Facebook argues that Plaintiffs’ allegations are

1 circular and conclusory that social advertising – defined as advertising sold on social networks – is
 2 not interchangeable with alternative forms of advertising because of the extensive ability to target
 3 advertisements to users on social media sites. Mot. 20-21. Facebook argues that there is no
 4 information about alternative advertising media’s ability to target users, and “the relative ability of
 5 various advertising formats to target consumers is a variation in product quality and is
 6 insignificant for purposes of defining an antitrust market.” Mot. 21.

7 By contrast, Plaintiffs argue that social advertising is not interchangeable with advertising
 8 on other digital platforms “because of the extensive ability to target advertising to users on social
 9 media sites like Facebook.” Opp. 14 (internal quotation marks omitted). Plaintiffs argue that
 10 other forms of Internet advertising, such as search and banner advertising, are not reasonable
 11 substitutes because they cannot target and track users as with social advertising. Opp. 14-15.

12 As stated above, the Court will not address the merits of Facebook’s issues at this time;
 13 however, the Court notes that it has real concerns over the Social Advertising Market. As the
 14 Ninth Circuit has recognized, “many courts have rejected antitrust claims reliant on proposed
 15 advertising markets limited to a single form of advertising.” *Hicks v. PGA Tour, Inc.*, 897 F.3d
 16 1109, 1123 (9th Cir. 2018); see *Kinderstart.com LLC v. Google, Inc.*, No. C06-2057JFRS, 2007
 17 WL 831806, at *6 (N.D. Cal. Mar. 16, 2007) (“[T]here is no logical basis for distinguishing the
 18 Search Ad Market from the larger market for Internet advertising. Because a website may choose
 19 to advertise via search-based advertising or by posting advertisements independently of any
 20 search, search-based advertising is reasonably interchangeable with other forms of Internet
 21 advertising.”). Plaintiffs’ amendment should address this issue as well as clearly define the
 22 boundaries of this market and allege that Plaintiffs participate in the Social Advertising Market.

23 **2. Monopolization and Attempted Monopolization (Counts I, II, and V)**

24 Under Section 2 of the Sherman Act, it is unlawful to “monopolize, or attempt to
 25 monopolize, or combine or conspire with any other person or persons, to monopolize any part of
 26 the trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 2. “To
 27 plausibly plead a monopolization claim, plaintiffs must allege: (a) the possession of monopoly
 28 power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c)

causal antitrust injury.” *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1159 (9th Cir. 2019) (internal quotation marks omitted). And, “[t]o state a claim for attempted monopolization, a plaintiff must allege: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.” *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1034-35 (C.D. Cal. 2007) (internal quotation marks omitted).

Facebook challenges Plaintiffs’ allegations as to the conduct element of these claims. Specifically, Facebook argues that Plaintiffs’ monopolization and attempted monopolization claims fail because they are premised on a theory “that Facebook was required to prop up competitors by providing APIs to developers who could then create applications that might one day emerge to compete with Facebook,” and there is no duty to aid competitors. Mot. 21-25. Facebook argues that the general principle is that firms are not required to cooperate with rivals by selling them products that would help the rivals compete, and courts are very cautious to recognize exceptions to this principle. Mot. 21-22. Facebook, moreover, argues that the narrow exception identified in *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585 (1985), does not apply. Mot. 22-24. Specifically, Facebook argues that Plaintiffs have not alleged the existence of a cooperative venture and there was no profit sacrifice by Facebook. Mot. 23-24. Facebook argues that Plaintiffs make only conclusory allegations to support their Section 2 claim and, in the absence of a duty to deal, which is not alleged, Facebook has no obligation to justify its alleged API withdrawal policy change. Mot. 24. Additionally, Facebook argues that Plaintiffs’ claims still fail even if the scheme is broader and includes the Whitelist and Data Sharing Agreements as well as Facebook’s acquisitions of Instagram and WhatsApp. Reply 11-12. Facebook argues that the agreements did not bar the agreements’ counterparties from providing data to Plaintiffs and Plaintiffs fail to allege that they could not obtain data from any signatory to a Whitelist and Data Sharing Agreement. Reply 11-12. Moreover, Facebook argues that the acquisitions of Instagram and WhatsApp were not anticompetitive and therefore do not help Plaintiffs’ claim. Reply 12.

Plaintiffs oppose and lay out the alleged monopolization scheme. Opp. 5-7. Plaintiffs argue that Facebook’s argument “is an attempt to dismember the API withdrawal from the alleged

scheme, and to attack that by itself is a refusal to deal”; however, Plaintiffs argue that courts take a holistic look at an allegedly anticompetitive scheme. Opp. 7. Thus, Plaintiffs argue that Facebook must consider the Whitelist and Data Sharing Agreements, Facebook’s targeting of developers for secret agreements and acquisition, and Facebook’s acquisition of Instagram and WhatsApp. Opp. 7. Moreover, relying on *Aspen Skiing*, Plaintiffs argue that the API withdrawal itself is sufficient to plead an unlawful refusal to deal. Opp. 7-10. Specifically, Plaintiffs argue that Facebook voluntarily entered into profitable business arrangements with third-party developers, and Facebook profited from selling access to its social data. Opp. 8-9. Plaintiffs argue that Facebook stopped selling access to its social data, sacrificing significant profits, without a legitimate business or technical justification. Opp. 9-10.

In general, there is “no duty to aid competitor,” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); however, “[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified,” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). Thus, “[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.” *Trinko*, 540 U.S. at 411. The Supreme Court, however, has “been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.” *Id.* The Supreme Court recognized such an exception in *Aspen Skiing*, but that case is “at or near the outer boundary of § 2 liability.” *Id.*

In *Aspen Skiing*, the defendant owned three of the four mountains in the Aspen, Colorado ski area, the plaintiff owned the fourth mountain, and for several years the parties offered a multiple-day, multiple-area ticket that allowed skiers to ski all four mountains. *Aspen Skiing*, 472 U.S. at 589-90. This joint ticket was often cheaper than purchasing single-day tickets, and the revenue from the tickets was split between the parties based on the percentage that ticketholders used their tickets on each mountain. *Id.* at 589, 592. The defendant decided to discontinue the joint ticket, and instead offered to continue participating in the joint ticket only if the plaintiff agreed to receive a fixed percentage of the revenue that was lower than the historical average

1 based on usage. *Id.* at 592. After the plaintiff rejected the offer, the defendant continued to offer a
 2 joint ticket to its three mountains, and the plaintiff attempted to market its own ticket package by
 3 offering ski passes to the fourth mountain with vouchers equal to the retail price of a single-day
 4 ticket at one of the defendant's mountains. *Id.* at 593-94. The defendant did not accept these
 5 vouchers and refused to sell lift tickets to its mountains to the plaintiff at retail price. *Id.* at 593.
 6 The Supreme Court upheld a jury verdict in favor of the plaintiff on its claim that the defendant
 7 had monopolized the market for downhill skiing services in Aspen. *Id.* at 604-05.

8 The Supreme Court in its later *Trinko* decision and the Ninth Circuit in *MetroNet* have
 9 called out significant factors present in *Aspen Skiing* that justified the exception to the “no duty to
 10 deal” rule. Those factors included: (1) “the unilateral termination of a voluntary and profitable
 11 course of dealing”; (2) “the defendant’s refusal to sell tickets to the plaintiff ‘even if compensated
 12 at retail price,’ thus ‘suggesting a calculation that its future monopoly retail price would be
 13 higher’”; and (3) the defendant’s refusal “to provide to their competitors products that were
 14 already sold in a retail market to other customers.” *MetroNet Servs. Corp. v. Qwest Corp.*, 383
 15 F.3d 1124, 1132-33 (9th Cir. 2004); *see Trinko*, 540 U.S. at 407-08. In both cases, the Ninth
 16 Circuit and the Supreme Court did not find facts sufficient to apply the *Aspen Skiing* exception.
 17 *See Trinko*, 540 U.S. at 407-08; *MetroNet*, 383 F.3d at 1132-33.

18 The Court tends to agree with Facebook that this claim, as alleged, fails because there is no
 19 duty to deal allegation and the *Aspen Skiing* exception does not apply to the allegations of
 20 Facebook’s refusal to deal. While it appears that Plaintiffs have alleged a unilateral termination of
 21 a voluntary and profitable course of dealing, *see, e.g.*, Compl. ¶¶ 111-23, there are no allegations
 22 that Facebook refused to provide products to its competitors that were already sold in a retail
 23 market to other customers. Indeed, the Complaint alleges that Facebook “refused to sell its social
 24 data to any *competitive* third-party developer,” Compl. ¶ 118 (emphasis added), and does not
 25 allege that this data was sold in a retail market to other customers, *see e.g.*, Opp. 6 (“Facebook
 26 therefore ordered that any competitive app be denied even the ability to purchase advertising from
 27 Facebook – at any price”); Compl. ¶¶ 113, 118-23.

28 In addition, Plaintiffs argue that Facebook acquired Instagram and WhatsApp because they

were rapidly growing and could potentially compete with Facebook. Opp. 6. And, had the acquisition not occurred, Plaintiffs argue that “Facebook would have had to compete directly with Instagram and WhatsApp.” Compl. ¶ 310. Plaintiffs also argue that Facebook is integrating WhatsApp and Instagram to “consolidate its power over segmented global markets and prevent effective divestiture from potential regulatory action.” Opp. 6; *see* Compl. ¶¶ 293-314. These allegations, however, are merely conclusory and Plaintiffs provide no factual support for their allegations that Instagram and WhatsApp were willing to, or could, harvest and monetize social data to compete with Facebook.

Accordingly, Plaintiffs have failed to state a claim for monopolization or attempted monopolization.

3. Whitelist and Data Sharing Agreements (Count III)

Facebook argues that Plaintiffs fail to state a claim under Section 1 of the Sherman Act for the Whitelist and Data Sharing Agreements because Plaintiffs’ hub-and-spoke theory is incoherent. Mot. 25. Specifically, Facebook argues that even assuming the agreements between Facebook and its horizontal competitors qualify as vertical agreements, Plaintiffs “allege no agreements in the rim of the wheel.” Mot. 25. Facebook further argues that the Court cannot infer such coordination and Plaintiffs fail to plead facts pointing toward a meeting of the minds of the alleged conspirators. Mot. 25. Plaintiffs, on the other hand, argue that the Complaint alleges the existence of agreements between Facebook and its direct competitors, which is “a straightforward horizontal output restriction [and] *per se* illegal.” Opp. 17. Plaintiffs argue that they have stated a claim because the Complaint explains that “the agreements between Facebook and whitelisted developers lacked any legitimate business or technical basis, such that there were no procompetitive justifications for these agreements to outweigh their anticompetitive effects in the Social Data and Social Advertising markets.” Opp. 17-18.

“A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes.” *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th

1 Cir. 2015). Based on Plaintiffs' opposition, it is unclear whether they are still pursuing a hub-and-
2 spoke theory. As stated at the hearing, however, Plaintiffs have failed to plausibly allege a claim
3 under this theory because Plaintiffs fail to plausibly allege the rim of the wheel – that is, Plaintiffs
4 fail to plausibly allege horizontal agreements among the spokes. Accordingly, the Court finds that
5 there is no viable claim under Section 1 of the Sherman Act.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court GRANTS Facebook's motion to dismiss and
8 DISMISSES WITH LEAVE TO AMEND IN PART and DISMISSES WITHOUT LEAVE TO
9 AMEND IN PART Plaintiffs' Complaint. Plaintiffs shall file an amended complaint within thirty
10 (30) days of the date of this Order.

11
12 **IT IS SO ORDERED.**

13 Dated: July 8, 2020



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15 **BETH LABSON FREEMAN**
16 United States District Judge
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